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Filing date: **05/22/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91199752
Party	Defendant Afgritech Ltd.
Correspondence Address	THOMAS H VAN HOOZER HOVEY WILLIAMS LLP 10801 MASTIN BLVD , SUITE 1000 KANSAS CITY, MO 66210 UNITED STATES tvh@hoveywilliams.com, clb@hoveywilliams.com, litigation@hoveywilliams.com
Submission	Opposition/Response to Motion
Filer's Name	Cheryl L. Burbach
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Signature	/Cheryl L. Burbach/
Date	05/22/2012
Attachments	Exhibit H-O.pdf ( 39 pages )(7902852 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

EVONIK DEGUSSA GMBH,  
Opposer,

v.

Opposition No. 91199752

AFGRITECH, LTD.,  
Applicant.

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**APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S  
MOTION FOR SUMMARY JUDGMENT**

**EXHIBIT H**



OFFICE FOR HARMONIZATION IN THE INTERNAL  
MARKET  
(TRADE MARKS AND DESIGNS)  
The Boards of Appeal

**DECISION**  
**of the Second Board of Appeal**  
**of 22 March 2010**

In Case R 548/2009-2

**Evonik Degussa GmbH**  
Rellinghauser Str. 1-11  
D-45128 Essen  
Germany

Opponent / Appellant

represented by Roland Weiß, Rodenbacher, Chaussee 4, D-63457, Hanau-Wolfgang,  
Germany

v

**Afgri Operations Limited**  
Block B2 Knightsbridge Manor  
33 Sloane Street  
Bryanston 2129  
South Africa

Applicant / Respondent

represented by ONEL TRADEMARKS, Leeuwenveldseweg 12, NL-1382 LX, Weesp,  
The Netherlands

APPEAL relating to Opposition Proceedings No B 1 131 418 (Community trade mark  
application No 5 084 116)

**THE SECOND BOARD OF APPEAL**

composed of T. de las Heras (Chairperson and Rapporteur), H. Salmi (Member) and  
G. Bertoli (Member)

Registrar: J. Pinkowski

gives the following

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Language of the case: English

DECISION OF 22 MARCH 2010 – R 548/2009-2 – AMINOMAX/AMINODAT

**AFGR0000014**

## Decision

### Summary of the facts

- 1 By an application filed on 18 May 2006, Afgri Operations Limited ('the applicant') sought to register the word mark

### AMINOMAX

for 'foodstuffs for animals' in Class 31.

- 2 The application was published in the Community Trade Marks Bulletin No 006/2007 of 12 February 2007.
- 3 On 12 March 2007, Evonik Degussa GmbH ('the opponent') filed a notice of opposition against the application pursuant to Article 8(1)(b) and 8(5) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ EC L78 of 24 March 2009, p. 1) ('CTMR') – codified version of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark ('CTMR 1994').
- 4 The opposition, directed against the CTM application was based on Community trade mark No 16 899 for the word mark 'AMINODAT', filed on 1 January 1996 and registered on 24 November 1997 for goods and services in Classes 9, 41 and 42.
- 5 The opposition is directed against all of the goods covered by the contested trade mark and is based all the goods and services covered by the earlier mark.
- 6 The opponent claims that the marks are similar. The goods and services covered by the earlier mark are very similar to the goods of the application. The opponent further puts forward, that it owns a family of 'AMINO-marks' and that customers could believe that the trade mark applied for forms part of this 'family of marks' and this could damage the reputation of the opponent.
- 7 The applicant did not reply to the opposition.
- 8 On 19 March 2009, the Opposition Division issued its decision (the 'contested decision') ruling on Opposition No 1 131 418 which rejected the opposition in its entirety. The opponent was ordered to bear the costs of the applicant. Its reasons can be summarized as follows.
  - The goods and services on which the opposition is based are 'computer software on animal nutrition' in Class 9; 'education of animal nutritionists' in Class 41; and 'consulting services for the animal feed industry about the use of animal feed ingredients' in Class 42.
  - The contested goods are 'foodstuffs for animals' in Class 31.

- The goods in Class 31 of the contested mark are animal foodstuffs and the goods and services covered by the earlier trade mark are goods and services which focus on the use or application of animal nutrition.
  - The applicant's goods are considered to be dissimilar to the goods and services for which the earlier mark is protected. The relevant point of contact is that they are about animal nutrition. However, this is not enough to justify a finding of similarity. They serve completely different purposes: foodstuffs for animals are directed at the general public, i.e. the consumer having animals. These goods can be found in supermarkets or retail outlets specialized in animals and animal-related products. The computer software, educational and consulting services are directed at a specialist consumer, i.e. the animal food industry.
  - Consequently, in spite of the fact that the goods and services are about animal food, the end-users and the use or application of the goods and services do not coincide. For these reasons it is considered that the conflicting goods and services are dissimilar.
  - Since the goods and/or services are clearly dissimilar, one of the necessary conditions contained in Article 8(1)(b) CTMR is not fulfilled, and the opposition must be rejected.
  - The opponent indicated in the statement of grounds that the contested mark would take unfair advantage of the repute of its earlier mark, as the opponent's mark forms part of a family of marks.
  - However, the opponent did not file any evidence to support such a claim or prove the reputation of its mark. The opponent merely included a listing of Community trade marks which could form part of a family of marks.
  - Consequently, the opponent has not substantiated its claim based on Article 8(5) CTMR.
  - Since the opponent is the losing party, it must bear the costs incurred by the applicant in the course of these proceedings.
- 9 On 12 May 2009, the opponent filed a notice of appeal against the contested decision and on 20 July 2009, it filed its grounds of appeal.
- 10 The appeal was forwarded to the Opposition Division for consideration pursuant to Article 62 CTMR and was remitted to the Boards of Appeal on 5 August 2009.
- 11 The applicant filed observations on the appeal on 20 October 2009 and the opponent filed a reply on 25 December 2009.

### Submissions and arguments of the parties

- 12 The opponent requests the Board to annul the contested decision, to reject the application in its entirety and to order the applicant to bear the costs incurred by the opponent in the proceedings. Its reasons can be summarized as follows:
- The Opposition Division has solely based its decision on an incomplete assessment of the similarity of goods.
  - The opponent finds inappropriate the statement of the Opposition Division that the applicant's goods are aimed at a general public, while the opponent's are directed at specialized consumers, and, therefore, there would not be any coincidence between the users and the use of the goods and services.
  - The evidence filed by the opponent as Enclosures 1 and 2 shows that such a statement is incorrect.
  - Enclosure 1 relates to a copy of a publication called *Afgriland*, dated January/February 2007. According to the opponent, it consists of the applicant's firm brochure, where pages 14 and 15, dealing with the marketing history of the opposed CTM application 'AMINOMAX' should be noticed. The whole content of the brochure shows clearly, in the opinion of the opponent, that the contested goods are not intended for consumers who have animals, especially pets, but for the global animal food industry.
  - Enclosure 2, relates to a copy of a publication called *FEED TECHNOLOGIES UPDATE*, dated March 2007, which, according to the opponent, informs relevant consumers about the newest offerings for the animal feed industry, dealing explicitly at page 13 with new software programs, followed by a report in page 14 about the applicant's product branded 'AMINOMAX'.
  - From the above, it is evident that there is a clear similarity between the goods in question, because they are directed at the same end users and have the same distribution channels. They are also complementary goods.
  - The marks are confusingly similar, beginning with the identical two syllables AMI-NO, they both have the same number of syllables and letters and an identical intonation following the vocal series A-I-O-A, which are identical in both marks.
  - There is an aural similarity between the marks and the differences in the letters 'd/m' in the middle of the marks are not sufficient to differentiate between the signs.
  - Following the similarity of the goods and services and between the signs, there is a likelihood of confusion on the part of the public.
  - Concerning the claim on the basis of Article 8(5) CTMR, the opponent remarks that sufficient information has been submitted about the ownership by the

opponent of 16 further Community trade marks, a series of marks with the element 'amino'.

- These marks have been advertised and used for long periods of time, especially for products and services for the animal food industry and they possess valuable reputation and goodwill in the market.
  - Accordingly, it is requested that the application be refused in totality and the costs paid by the applicant.
- 13 In its observations on the appeal, the applicant requests that the appeal be dismissed and the contested decision confirmed. Its reasons can be summarized as follows:
- The mere fact that potential customers might overlap does not constitute an indication of similarity.
  - The products and services are further not complementary in the sense that one is indispensable or important for the use of the other and is not merely auxiliary or ancillary.
  - Concerning the similarity between the signs, 'AMINO' is a weak element of the mark since amino acid molecules containing the amine group are often used in animal food.
  - Concerning the series of marks, the owner should demonstrate that the public concerned recognizes the common part of these marks as originating from one undertaking. In the case of a weak common element, there should not be an assumption of a family mark. Moreover, goods and services should be identical or similar to the 'common core' of the goods or services covered by the earlier marks, which is not the case here.
  - The series of marks do not show that the earlier mark enjoys a reputation or that the use of the applicant's mark takes unfair advantage of or is detrimental to the repute or the distinctiveness of the earlier mark.
- 14 In its reply to the applicant's observations, the opponent confirms its arguments and refers in full to its previous observations.

#### **Reasons**

- 15 The appeal complies with Articles 58, 59 and 60 CTMR and Rule 48 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing the CTMR ('CTMIR') (OJ EC 1995 No L 303, p. 1; OJ OHIM 2-3/95, p. 258) as amended. It is, therefore, admissible.
- 16 The appeal however is unfounded since there is no likelihood of confusion between the conflicting marks for the reasons given below.

17 Article 8 CTMR provides:

‘1. Upon opposition by the proprietor of an earlier trade mark, the trade mark applied for shall not be registered:

(b) if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods and services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected, the likelihood of confusion includes the likelihood of association with the earlier trade mark.

(...)

- 18 Furthermore, upon opposition by the proprietor of an earlier trade mark within the meaning of paragraph 2, the trade mark applied for shall not be registered where it is identical with or similar to the earlier trade mark and is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered, where in the case of an earlier Community trade mark the trade mark has a reputation in the Community and, in the case of an earlier national trade mark, the trade mark has a reputation in the Member State concerned and where the use without due cause of the trade mark applied for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.’
- 19 For the purposes of applying Article 8(1)(b) CTMR, a likelihood of confusion presupposes both that the mark applied for and the earlier mark are identical or similar, and that the goods or services covered in the application for registration are identical or similar to those in respect of which the earlier mark is registered. Those conditions are cumulative. Thus failure to satisfy one of them is sufficient to render inapplicable Article 8(1)(b) CTMR (see to that effect, judgments of the Court of 29 September 1998 in Case C-39/97 *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer, Inc., formerly Pathe Communications Corporation* (‘Canon’) [1998] ECR I-5507, at paragraph 22); of 12 October 2004 in Case C-106/03 *Vedial S.A v OHIM* (‘Hubert’), at paragraph 51 onwards; and order of 9 March 2007 in Case C-196/06 *Alecansan, SL v OHIM* (‘Comp USA’), [2006] ECR publication pending, at paragraphs 24-26, 37-38 and 44).
- 20 It is important to stress that for the purposes of applying Article 8(1)(b) CTMR ‘even where a mark is identical to another with a highly distinctive character, it is still necessary to adduce evidence of similarity between the goods or services covered’ (see, to that effect, ‘Canon’ and ‘Comp USA’, at the paragraphs cited above).
- 21 In assessing the similarity of the goods or services in question, all the relevant factors relating to the link between those goods or services should be taken into account. Those factors include, *inter alia*, their nature, their intended purpose,



their method of use and whether they are in competition with each other or are complementary (see 'Canon', at paragraph 23).

22 In the present case, the goods and services to be compared are the following:

Class 9: Computer software on animal nutrition.	Class 31: Foodstuffs for animals.
Class 41: Education of animal nutritionists.	
Class 42: Consulting services for the animal feed industry about the use of animal feed ingredients.	
Earlier right	Community trade mark application

- 23 'Computer software on animal nutrition' has a different nature and purpose than 'foodstuffs for animals'. They both satisfy different needs, as one is used to feed animals while the other provides IT applications and tools. Companies producing foodstuffs for animals do not develop software or commercialize such computer programs.
- 24 The 'education of animal nutritionists' has a different nature and purpose too from 'foodstuffs for animals'. Such educational services are provided to persons by experts in nutrition and are aimed at transmitting knowledge. Those types of educational services are not provided by companies which actually take care of the production of food for animals.
- 25 The 'consulting services for the animal feed industry about the use of animal feed ingredients' are aimed at the feeding industry and not at the general public, as happens with foodstuffs for animals. The nature of those services is manifestly different to that of animal foodstuffs. The same can be said concerning the intended purpose, on the one hand to provide advice to companies, on the other, to feed animals.
- 26 As the contested decision found, the compared goods and services are deemed different in nature, function, use and end users for the reasons given by the contested decision, to which the Board refers to avoid repetition.
- 27 Moreover, the compared goods and services are about animal nutrition and food but are of a different nature and they satisfy completely different needs; they do not compete with one another, they are neither interchangeable nor substitutable for one another nor complementary since one is not indispensable or important for the use of the other. For all these reasons, the compared goods and services cannot be deemed similar.

- 28 The fact that, according to the opponent's arguments and evidence, the applicant might be using the sign for goods other than the ones applied for cannot be considered for the purpose of comparing, within the opposition and appeal proceedings, the goods and services for which both confronted signs are actually registered. Moreover, documents identified as enclosures 1 and 2 filed by the opponent refer to a product brand as 'AMINOMAX', among other indications, as follows: 'AminoMax is the trade mark of new types of high quality rumen by pass oilseed proteins for feeding cattle and sheep' (enclosure 1, page 14); 'AminoMax is the trademark for the new type of rumen by pass proteins' which 'in the ration ensures the maximum of metabolizable amino acids' (enclosure 2, page 14). Contrary to the opponent's argument, this does not prove that the finding of the contested decision on the dissimilarity of the goods is incorrect.
- 29 Since the goods covered by the conflicting trade marks are found dissimilar, the Board has to conclude that there is no likelihood of confusion, no matter how similar the marks might be, given that the likelihood of confusion presupposes that the goods or services covered are identical or similar according to the text of Article 8(1)(b) CTMR and the case-law mentioned above.
- 30 For the application of Article 8(5) CTMR the first condition to be met consists in the existence of an earlier mark with reputation in the relevant territory. In the present case, the Board confirms the finding of the contested decision in the sense that no evidence was filed within the opposition proceedings to prove the reputation of the earlier mark, 'AMINODAT'. The fact that the applicant owns several trade mark registrations including the same element, 'AMINO', does not necessarily prove that its earlier mark has reputation. The statement made by the opponent about the fact that these marks have been used and advertised for a long period has not been confirmed by any evidence. Therefore, as no further evidence has been filed to prove its extent, the Board concurs with the contested decision that the opponent has failed to substantiate its claim under Article 8(5) CTMR.
- 31 It follows from all the above that the appeal must be dismissed.

#### **Costs**

- 32 Pursuant to Article 85(1) CTMR, the opponent, as the losing party, must bear the costs of the appeal proceedings. Pursuant to Article 85(6) first sentence CTMR and Rule 94(3) last sentence CTMR, the opponent is therefore ordered to reimburse to the applicant the costs of professional representation for the appeal proceedings in the amount of EUR 550 specified in Rule 94(7)(d) CTMR. As to the opposition proceedings, the Opposition Division ordered the opponent to bear the applicant's representation costs in the amount of EUR 300.

**Order**

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal;**
- 2. Orders the opponent to bear the costs incurred by the applicant in the opposition and appeal proceedings in the total amount of EUR 850.**

Signed

T. De Las Heras

Signed

G. Bertoli

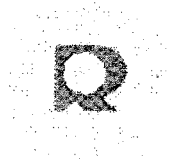
Signed

H. Salmi

Registrar:

Signed

J. Pinkowski



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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Applicant.

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**APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S  
MOTION FOR SUMMARY JUDGMENT**

**EXHIBIT I**


You are here: [Home](#) > [Quality plus](#) > Databases

## CTM-ONLINE - Detailed trade mark information



**Trade mark name :** AMINOMAX GREEN  
**Trade mark No :** 010251288  
**Trade mark basis:** CTM  
**Date of receipt :** 08/09/2011  
**Number of results:** 1 of 2

[Request an inspection](#)

 [Certified copy of the Application form](#)



	Trade mark	
<b>Filing date:</b>	08/09/2011	
<b>Nice Classification:</b>	5, 31 (  Nice classification)	
<b>Trade mark:</b>	Individual	
<b>Type of mark:</b>	Word	
<b>Acquired distinctiveness:</b>	No	
<b>Applicant's reference:</b>	T224870EM/GIP/T27372CTM	
<b>Status of trade mark:</b>	Application opposed (  Glossary)	
	(  History of statuses)	
<b>Filing language:</b>	English	
<b>Second language:</b>	Italian	
<b>National search requested:</b>	No	

### Graphic representation

No entry for application number: 010251288.

### List of goods and services

<b>Nice Classification:</b>	5
<b>List of goods and services</b>	Veterinary preparations; antibiotic food supplements for animals; non-medicated food supplements for animals being minerals, trace elements and/or vitamins; preparations for use as nutritional supplements for animal foodstuffs being minerals, trace elements and/or vitamins; protein preparations for use as additives to animal foodstuffs for veterinary purposes.
<b>Nice Classification:</b>	31
<b>List of goods and services</b>	Animal foodstuffs; food supplements (non-medicated) for animals; non-medicated preparations for use as nutritional additives or supplements for animal foodstuffs; protein preparations for use as additives to animal foodstuffs (other than for veterinary or medical purposes).

### Description


**Description of the mark:** -

### Owner

<b>Name:</b>	Afgritech Limited
<b>ID No:</b>	473201
<b>Natural or legal person:</b>	Legal entity
<b>Address:</b>	Old Croft, Stanwix
<b>Post code:</b>	CA3 9BA

**Town:** Carlisle,  
**County:** Cumbria  
**Country:** UNITED KINGDOM  
**Correspondence address:** Afgritech Limited Old Croft, Stanwix Carlisle, Cumbria  
CA3 9BA REINO UNIDO

### Representative

**Name:** URQUHART-DYKES & LORD LLP  
**ID No:** 10677  
**Type:** 4 - Association  
**Address:** Tower North Central Merrion Way  
**Post code:** LS2 8PA  
**Town:** Leeds  
**Country:** UNITED KINGDOM  
**Correspondence address:** URQUHART-DYKES & LORD LLP Tower North  
Central Merrion Way Leeds LS2 8PA REINO UNIDO  
**Telephone:** 00 44-1132452388  
**Fax:** 00 44-1132430446  
**E-mail:**  info@udl.co.uk

### Seniority

No entry for application number: 010251288.

### Exhibition priority

No entry for application number: 010251288

### Priority

No entry for application number: 010251288.

### International Registration Transformation

No entry for application number: 010251288.

### Publication

**Bulletin no.:**  2011/208  
**Date of publication:** 03/11/2011  
**Part:** A.1

### Opposition

**Opposition No:** 001963803  
**Reception date:** 01/02/2012  
**Opponent name:** Evonik Degussa GmbH  
**Opponent ID No:** 110546

### Cancellation

No entry for application number: 010251288

### Appeals

No entry for application number: 010251288.

### Recordals

No entry for application number: 010251288.

### Renewals

No entry for application number: 010251288.



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**APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S  
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**EXHIBIT J**



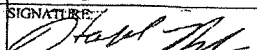
2011

New Hampshire Department of Agriculture  
Application for the Registration of Commercial Feeds

To the Commissioner of Agriculture, Markets & Food:

Application is hereby made for the registration of the commercial feeds listed below, for the calendar year ending December 31, 2011, under the provisions of the New Hampshire Commercial Feed Law, RSA 435:17-31.

PLEASE PRINT CLEARLY:

COMPANY SUBMITTING APPLICATION: Afgriotech LLC		# OF PRODUCTS: 3	AMOUNT (eq \$75 per product): \$225.00	DATE: 07/11/2011
REGISTERED FOR (contact/company name on product label): Afgriotech LLC		WEBSITE: www.aminomax.com		
MAILING ADDRESS: 200 Willow Street	CITY: Watertown	STATE/PROVINCE: NY	ZIP CODE: 13601	COUNTRY: USA
PERSON COMPLETING APPLICATION: Harold Rozanski	TITLE: Plant Manager	EMAIL: Harold@aminomax.com		
PHONE: 315-785-3625	FAX: 315-785-3627	SIGNATURE: 		

Please list products in the space below. Include brand, product name, and if new or renewed registration.

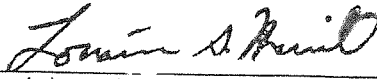
AminoMax, AminoMax S, new registration  
AminoMax, AminoMax C, new registration  
AminoMax, AminoMax Pro, new registration

(The section below for Department of Agriculture, Markets & Food use only.)

**CERTIFICATE OF REGISTRATION**

This is to certify that the registration fee has been paid on the products listed above and that the registrant is entitled to sell these products in the state of New Hampshire for a period beginning with this date and ending December 31, 2011, unless such registration is cancelled for due cause.

Registration #'s: 10507-10509 Date 7/26/2011

  
Commissioner of Agriculture, Markets & Food

AFGR000007





STATE OF NEW YORK  
**DEPARTMENT OF AGRICULTURE AND MARKETS**  
 10B AIRLINE DRIVE  
 ALBANY, NEW YORK 12235

DIVISION OF FOOD SAFETY  
 AND INSPECTION  
 518-457-5457

### LICENSE NOTICE

The lower portion of this notice is your license permitting you to manufacture commercial feed in New York State.

As a licensed feed manufacturer, you are obligated under Article 8 of the Agriculture and Markets Law Relating to the Manufacture and Distribution of Commercial Feed to conspicuously display this license so that it may readily be seen by officers and employees of the department.

Further Article 8 states in part "No person shall publish or advertise the sale of any commercial feed unless the publication or advertisement is accompanied by the person's license number."

Your failure to comply with the provisions of Article 8 could result in the suspension, revocation or non-renewal of this license. A renewal application will be mailed to you each year.

Fee Paid: \$100 Date Issued: 07/20/2011 Expires: 12/31/2011	<b>NEW YORK STATE</b> <b>DEPARTMENT OF AGRICULTURE</b> <b>AND MARKETS</b> <b>Albany, NY 12235</b>	Establishment No.: 701065 License No.: 640084 Entity No.: 49411
<b>FEED MANUFACTURERS LICENSE</b>		
Pursuant to Article 8 of the Agriculture and Markets Law the licensee is authorized to perform those activities requested in its application for this license		
This license cannot be sold or transferred.		
AFGRITECH LLC AMINOMAX 200 WILLOW STREET WATERTOWN, NY 13601	 Darrel J. Aubertine Commissioner	



**AFGR000008**

VERMONT AGENCY OF AGRICULTURE, FOOD, & MARKETS  
AGRICULTURAL RESOURCE MANAGEMENT DIVISION  
116 STATE STREET, MONTPELIER, VT 05620-2901  
(802) 828-2431

CERTIFICATE OF REGISTRATION FOR COMMERCIAL FEEDING STUFFS FOR 2011

Correspondent:

AFgritech LLC  
200 Willow St  
Watertown NY 13601  
US

Date: 8/11/2011

USA Plants ID: 000H46

Certificate Expires: 3/31/2012

Number of Products: 3

Amount Paid: \$225.00

Barcode: 13797

This certifies that the products listed on this certificate have been registered in accordance with the provisions of Title 6, Chapter 25 of the Vermont Statutes Annotated, as amended. Sale of these products is therefore authorized in Vermont until the expiration date so long as they are sold, offered for sale or exposed for sale under labeling showing the pertinent information exactly as shown in the application for registration in compliance with the laws and regulations of Vermont.



Secretary of Agriculture,  
Food and Markets

AFGRITECH LLC (000H46)

Label Company: AFGRITECH LLC

<u>VT Code</u>	<u>Package</u>	<u>Product Name</u>
50374	Other	Aminomax C
50375	Other	Aminomax S
50376	Other	Aminomax Pro

Class

AFGR000009

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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v.

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AFGRITECH, LTD.,  
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**APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S  
MOTION FOR SUMMARY JUDGMENT**

**EXHIBIT K**



## The Future of Amino Acid Nutrition

Improved Amino Acid supply resulting in:

- Improved Milk Production
- Improved Milk Components
- Reduced Manure Nitrogen



[www.Aminomax.com](http://www.Aminomax.com)



[www.Aminomax.com](http://www.Aminomax.com)



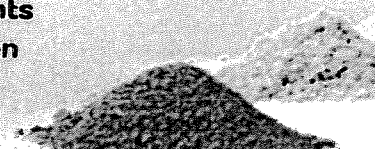
## The Future of Amino Acid Nutrition

AminoMax® is the most advanced amino acid bypass on the market today! AminoMax provides a consistent level of digestible lysine, methionine and other essential amino acids, which can increase milk protein, milk yield and milk quality.



**Improved Amino Acids provided by  
AminoMax can:**

- Improve Milk Production
- Improve Milk Components
- Reduce Manure Nitrogen



**Find out what AminoMax can  
do for your dairy operation today!**

Visit:  
**[www.AminoMax.com](http://www.AminoMax.com)**

Manufactured by:  
**AFGRITECH Inc.**  
200 Willow St.  
Watertown, NY 13601-2355  
(855) 785-3625

New York State Manufacturing License # 640084

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**INNOVATIVE:** On a conference call last week, Tyson Foods chief executive officer Donnie Smith said customers, despite the tough economy, continue to ask for innovative new products, like these any'tizers Quesa Dippers the company introduced last year. "Our discovery center is really busy," Smith said.

this was more than offset by the cost increases, with costs for grain and other feed ingredients \$250 million and \$395 million higher in the third quarter and first nine months of fiscal 2011 versus the same year-ago periods.

Smith said Tyson expects fiscal 2011 feed costs — including dried distillers grains, which "we are now using a lot of" — to be \$650 million higher than fiscal 2010 feed expenses.

He said those costs have risen steadily "in the modern grain era," with Tyson's liveweight production costs increasing from the mid-20 cents/lb. in the early 1970s to the mid-30 cents in 2005-10 and the mid-40 cents now.

Smith said the company attempts to balance customer demand with supplies, and in the third quarter, it began cutting production when demand started falling seriously short of expectations. However, he said the impact of production cuts won't be realized until late in the fourth quarter.

In response to a question during the company's media teleconference, Smith said Tyson has been decreasing production in line with reductions in industry-wide eggs set and chick placements, which, in recent weeks, have run about 5%.

The company noted that its chicken segment took a \$2 million loss in the third quarter but recorded a \$72 million gain in the first nine months on risk management activities related to energy and grain purchases.

Tyson also noted that its fiscal 2010 third-quarter and nine-month results included a gain of \$38 million on insurance proceeds.

## Beef, pork results

**For its beef business,** Tyson said results were a consequence of "maximizing revenues" — i.e., increasing beef prices — relative to increasing cattle prices, an accomplishment that was partially attributable to strong beef export sales. However, the company said this was off-set by increases in operating costs.

Tyson noted that it took a \$1 million

loss in the third quarter and a \$40 million loss in the first three quarters for risk management activities related to forward futures contracts for live cattle.

**For its pork segment,** Tyson said results were due to maximizing revenues relative to increasing hog prices that was partially attributable to strong pork export sales and mix and operational improvements.

The company noted that it took a loss of \$6 million in the third quarter and \$15 million in the first three quarters for risk management activities related to live hog forward futures contracts.

Tyson said it expects cattle and hog

supplies to be adequate for the rest of 2011 and in fiscal 2012 in the regions in which it operates packing plants.

**For its prepared foods segment,** Tyson said results reflected increases in selling prices that were partially offset by higher raw material and other operational costs.

Tyson, headquartered in Springdale, Ark., is the largest chicken integrator in the U.S. and the second-largest beef and pork processor. The company employs more than 115,000 people in the U.S. and around the world and markets meat and poultry products to customers in more than 10 countries. ■

# AMINOMAX®

## The Future of Amino Acid Nutrition

AminoMax® is the most advanced amino acid bypass on the market today! AminoMax provides a consistent level of digestible lysine, methionine and other essential amino acids, which can increase milk protein, milk yield and milk quality.

**Improved Amino Acids provided by AminoMax can:**

- Improve Milk Production
- Improve Milk Components
- Reduce Manure Nitrogen

Find what AminoMax can  
do for your dairy operation today!

Visit:

[www.AminoMax.com](http://www.AminoMax.com)


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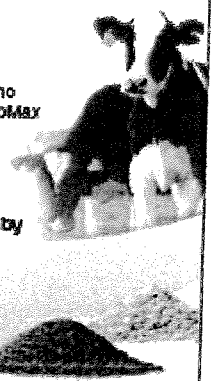
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## The Future of Amino Acid Nutrition

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**The Future of  
Amino Acid  
Nutrition**

Aminomax® is the most advanced amino acid bypass on the market today! Aminomax provides a consistent level of digestible lysine, methionine and other essential amino acids, which can increase milk protein, milk yield and milk quality.

**Improved Amino Acids provided by  
AminoMax can:**

- Improve Milk Production
- Improve Milk Components
- Reduce Manure Nitrogen

Find out what AminoMax can do for your dairy operation today.

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**AminoMax.com**

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### Next Generation of Bypass Protein

AminoMax is the next generation bypass protein supplement, providing essential bypass amino acids that are university research proven to stimulate milk production and milk quality. The new, state-of-the-art, patented manufacturing process is designed to provide precise and consistent product quality that optimizes your herd's milk components and milk production.



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# AMINOMAX

## Bypass Amino Acids with Superior Bioavailability

AminoMax represents more than 15 years of exhaustive university research and field testing, supported by an ongoing commitment to progressive improvements in manufacturing technology. The result is production of cost-effective, safe, plant-based bypass amino acids with superior bioavailability and unsurpassed quality and value.

# The Anatomy of a Feared

Historically, creating by-pass proteins was relatively simple. Combine reducing sugars with protein and heat vigorously to induce Maillard reactions. Until recently this is where development stopped. The problem with this process is that it is known to denature protein and reduces the availability of lysine and other essential amino acids. Utilizing lower process temperatures effectively preserves amino acid bioavailability, but also results in extensive ruminal degradation (poor rumen bypass).



The AminoMax® process focuses on optimizing the balance between Rumen Undegradable Protein and the availability of lysine and other essential amino acids

The Science of AminoMax® combines precisely controlled heating with naturally occurring enzymes in a state-of-the-art manufacturing facility to produce plant protein sources with high levels of Rumen Undegradable Protein (RUP) and high amino acid bioavailability. Ultimately, this increases MP (metabolizable protein) yield per pound of product, which is an unprecedented combination.

brochure\_pg4.pdf

# AMINOMAX

# The Future of Amino Acid Nutrition

AminoMax® is the most advanced amino acid bypass on the market today! AminoMax provides a consistent level of digestible lysine, methionine and other essential amino acids, which can increase milk protein, milk yield and milk quality.

**Improved Amino Acids provided  
by AminoMax can:**

- Improve Milk Production
- Improve Milk Components
- Reduce Manure Nitrogen



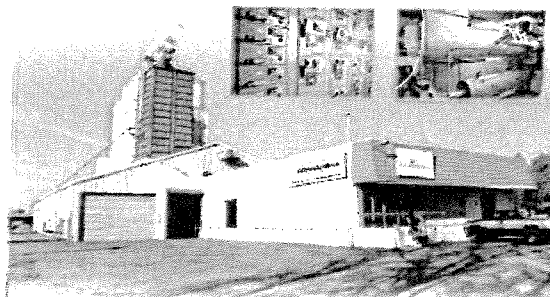
**aminomax.com**

brochure\_pg5.pdf

## AminoMax

### Amino Acid Bypass Supplement for Dairy Cattle

AminoMax® is designed to consistently meet your cows' amino acid requirements and allow your nutritionist to reduce the amount of crude protein in the diet, maximizing use of forages and fermentable carbohydrates. University research has shown that when dairy rations are properly formulated with AminoMax®, herd economics can be improved and to lower levels of nitrogen in the urine environmentally friendly.

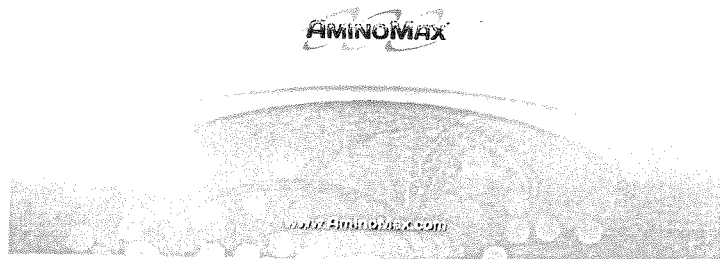


# AMINOMAX

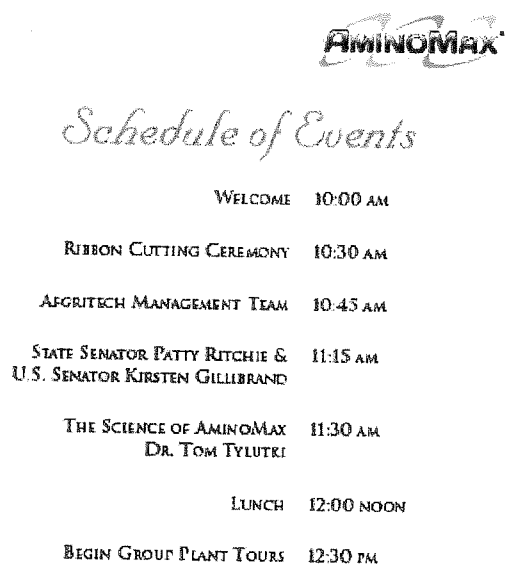
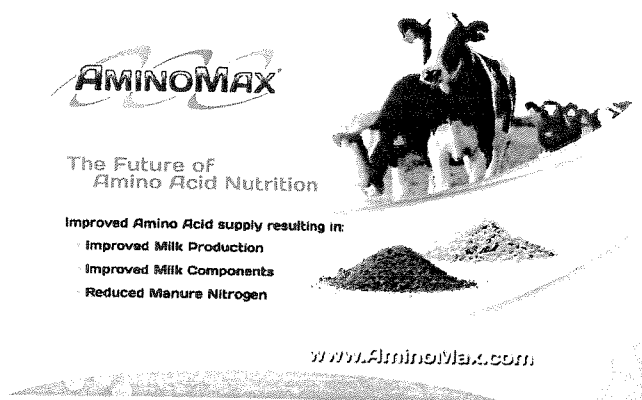
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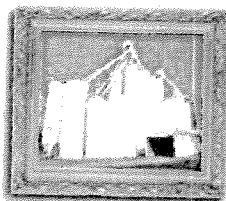
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# Amino Max – Logo Standards Guide

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Cordially Invited  
To Attend Our*

**AMINOMAX®**

*Plant Grand Opening*



THURSDAY, NOVEMBER 17, 2011  
10:00 AM TO 3:00 PM

invite\_front.pdf



## Color Guide:

CMYK	70, 58, 64, 74	50, 0, 55, 0	0, 0, 100
RGB	67, 151, 210	141, 198, 63	35, 31, 22
Pantone®	Pantone 2925 PC	376 PC	Pro Black C
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**AMINOMAX®**



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**AMINOMAX**

The Future of Amino Acid Nutrition

Improved Amino Acid supply resulting in:

- Improved Milk Production
- Improved Milk Components
- Reduced Manure Nitrogen

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Benefits // Bypass Amino Acids with Superior Bioavailability // Aminomax

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**AMINOMAX**

**Bypass Amino Acids with Superior Bioavailability**

Following the regulatory ban of animal-derived protein sources in human diets, the quest for excellence in amino acid nutrition (AminoMax) began. Research for the exciting technology was led by Dr. Jim Drouillard at Kansas State University, with an emphasis to produce cost-effective, economically processed plant protein sources that would provide high ruminal bypass and superior amino acid bioavailability. Today, AminoMax is manufactured in the United States, Argentina, England, and South Africa.

AminoMax represents more than 15 years of exhaustive university research and field testing, supported by an ongoing commitment to progressive improvements in manufacturing technology. The result is product of cost-effective, safe, plant-based bypass amino acids with superior bioavailability and unsurpassed quality and value.

**The AminoMax Difference**

Historically, creating bypass proteins was a relatively simple. Combine reducing sugars with protein and heat vigorously to induce Maillard reactions. Until recently this is where development stopped. The problem with this process is that it is known to denature protein and reduce the availability of lysine and other essential amino acids. Utilizing lower process temperatures effectively preserves amino acid bioavailability, but also results in extensive ruminal degradation (poor rumen bypass).

The AminoMax process focuses on achieving the balance between Ruminant Undegradable Protein and the availability of lysine and other essential amino acids.

The Science of AminoMax combines precisely controlled heating with naturally occurring enzymes in a state-of-the-art manufacturing facility to produce plant protein sources with high levels of Ruminant Undegradable Protein (RUP) and high amino acid bioavailability. Ultimately, this increases MP (metabolizable protein) yield per pound of product, which is an unprecedented combination.

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AminoMax, LLC 240 New St. Westborough, MA 01581-2228

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Agriculture, LLC 200 Wilson St. Westport, NY 12591-2355

## Bypass Protein

AMINOMAX is the next generation bypass protein supplement, providing essential bypass amino acids that are university research proven to stimulate milk production and milk quality. The new state-of-the-art, patented manufacturing process is designed to provide precise and consistent product quality that optimizes your herd's milk components and milk production.

### Amino Acid Bypass Supplement for Dairy Cattle

AMINOMAX is designed to consistently meet your cows' amino acid requirements and allow your ruminants to reduce the amount of crude protein in the diet. The existing level of forage and feedstuffs in the diet. University research has shown that when dairy rations are properly formulated with AMINOMAX, herd economics can be improved and farm costs can be reduced due to lower levels of nitrogen in the urine, making your dairy farm more environmentally friendly.

Web-Bypass Protein.png

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## A Quest for Excellence in Amino Acid Nutrition...

The development of AMINOMAX was initiated at Kansas State University in 1985 with the separation of producing cost-competitive, plant-based protein sources with high ruminal bypass and superior amino acid bioavailability. The utility of high quality protein sources resistant to microbial digestion was at that time clearly evident, but the 1987 regulatory bar on use of ruminant-derived proteins in dairy, beef, and sheep operations of the United States and Canada underscored the critical need for plant-based proteins with high ruminal bypass that could replace animal-based bypass proteins, both safely and cost-effectively.

Early attempts by Kansas State University researchers to produce a high-quality bypass protein focused on combining soybean meal with peroxidized soybean lipids. The peroxidized lipids served as reducing agents that could promote a controlled Maillard reaction, thus improving rumen bypass characteristics of plant-based proteins. When properly controlled, the Maillard reaction results in reversible binding of lysine and other amino acids by reducing compounds, making proteins that are resistant to digestion by microbes within the rumen, but that also are available for absorption in the small intestine. The peroxidized lipid process was very effective as a means of decreasing ruminal degradation of the protein, but the reaction proceeded too slowly to be commercially viable. These early experiments proved to be important developmental steps. However, as they became the impetus for conducting a series of investigations aimed at characterizing the component components of a variety of plant protein meals. Through this research the research team discovered that plant protein meals contain a variety of carbohydrate compounds that could be modified by enzymatic hydrolysis, yielding highly reactive sugar molecules that readily induced the desired browning reaction. Armed with this information, the researchers embarked on yet another series of experiments to explore the potential for using a wide range of natural enzymatic preparations to identify products that yielded optimal reactivity. Combinations of several key enzymes proved most effective, but none of these mixtures was cost-effective.

At this point the team arrived at a critical juncture in their research, turning their attention to select strains of yeast as sources of enzymes. These yeasts, when combined with plant proteins under carefully controlled processing conditions, could be induced to synthesize an abundance of natural enzymes. Enzymes produced by yeast strains of live yeasts effectively cleaved carbohydrates within the plant proteins sources, yielding large quantities of the desired reactive sugars that could induce the Maillard reaction in controlled Maillard reactions to create bypass proteins of unsurpassed quality and consistency. Subsequent experiments revealed that plant-based proteins produced with the new process offered the advantage of high ruminal bypass, but with far superior amino acid bioavailability.

This simple concept of combining select strains of live yeasts with plant proteins under meticulously controlled conditions has served as the foundation for development of AMINOMAX products, and was awarded a patent early in 2003. The AMINOMAX products of today represent the culmination of more than 15 years of exhaustive university research and field testing, supported by an ongoing commitment to progressive improvements in state-of-the-art manufacturing technology to produce cost-effective, safe, plant-based bypass protein products of unsurpassed quality and value.



Agriculture Plant in Westport, NY

Web-History.png

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## AMINOMAX

The Next Generation of Amino Acid Bypass


AMINOMAX is the most advanced amino acid bypass on the market today! AMINOMAX products are protein rich feeds made by a patented process that combines sugars and protein making a high quality, multiple Amino Acid bypass protein supplement. AMINOMAX provides a consistent level of digestible lysine, methionine and other essential amino acids, which can increase milk protein, milk yield and milk quality.

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### Improved Amino Acids provided by AMINOMAX can:

- Improve Milk Production
- Improve Milk Components
- Reduce Manure Nitrogen



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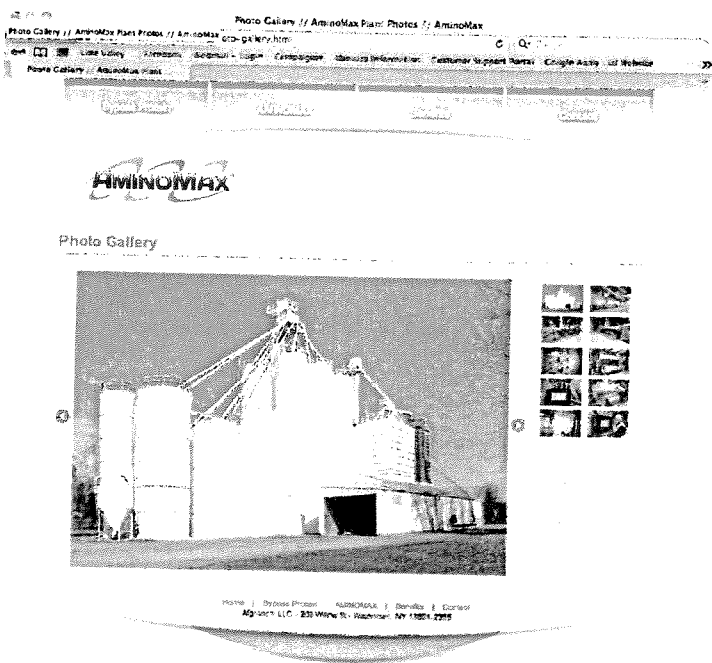
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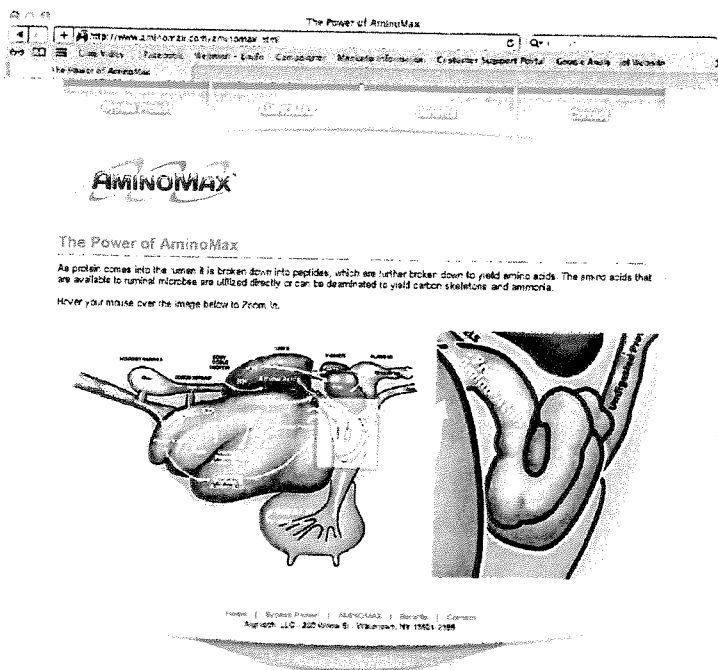


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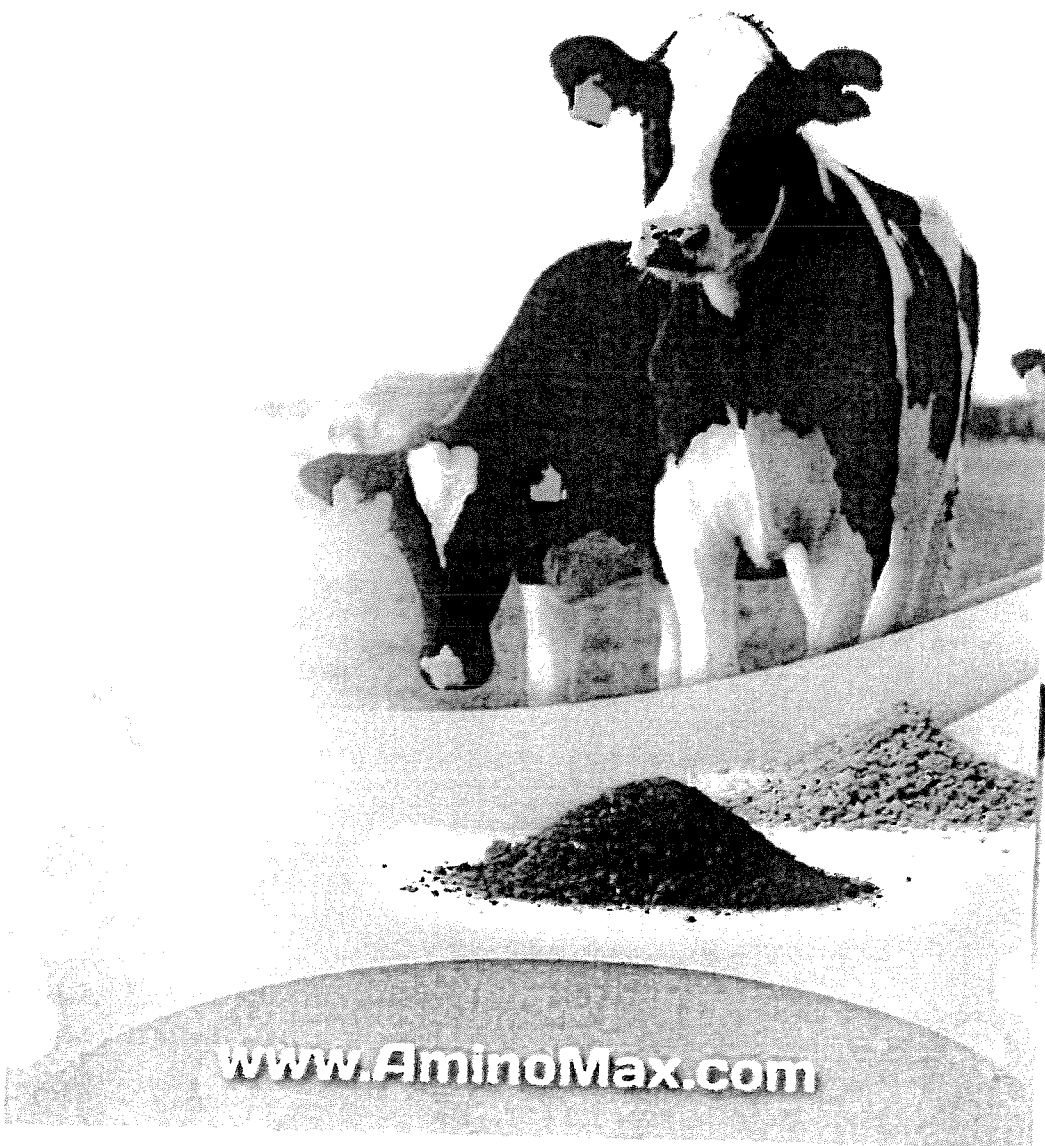
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Web-Photo Gallery.png



Web-Power of AminoMax.png



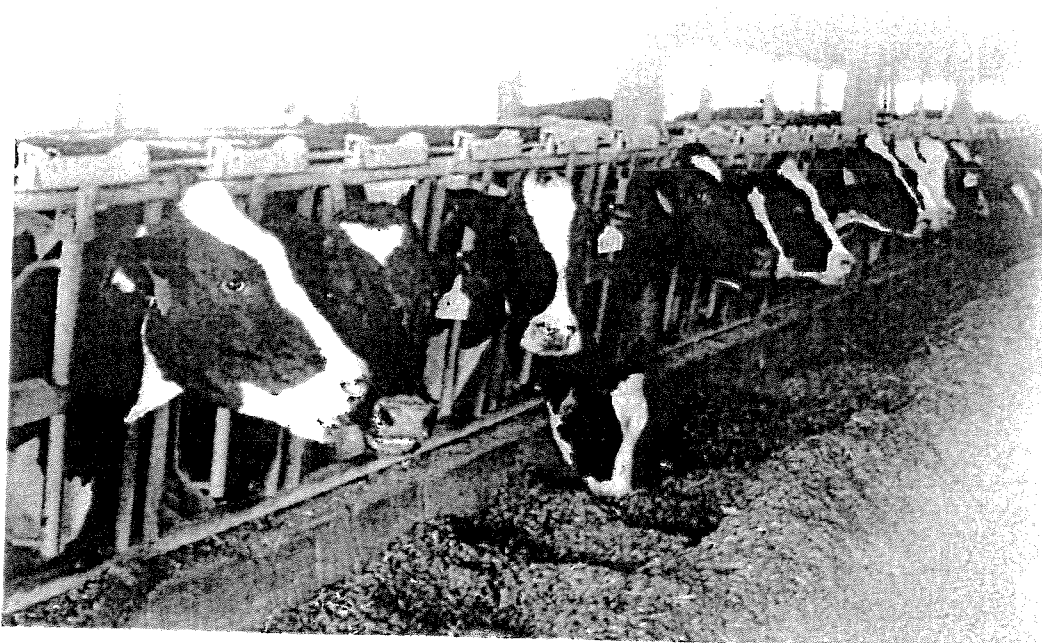
[www.AminoMax.com](http://www.AminoMax.com)

Front Cover

AFGR000038

## Next Generation of Amino Acid Bypass Protein

AminoMax is the next generation bypass protein supplement, providing essential bypass amino acids that are university research proven to stimulate milk production and milk quality. The new state-of-the-art, patented manufacturing process is designed to provide precise and consistent product quality that enhances your dairy cow's optimum milk components and milk production.

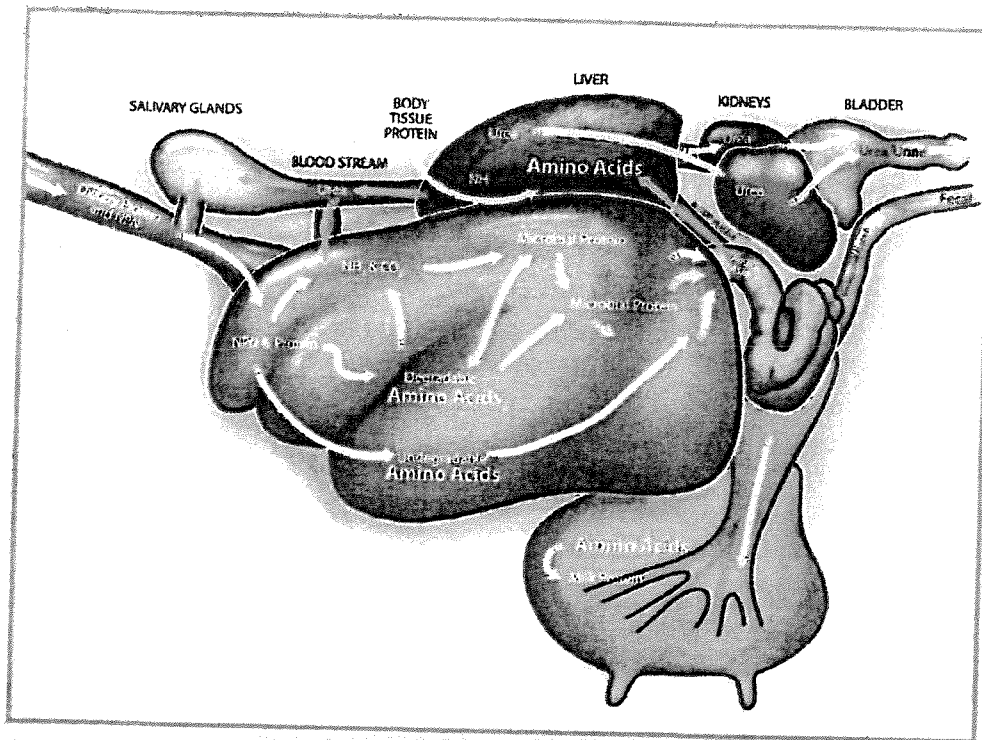


Inside Front Cover



## The Power of AminoMax

As protein comes into the rumen it is broken down into peptides, which are further broken down to yield amino acids. The amino acids that are available to rumen microbes are either used as intact amino acids or can be deaminated to yield carbon skeletons and ammonia.



**AMINOMAX<sup>®</sup>**

Inside Center Panel

AFGR000040

## Bypass Amino Acids with Superior Bioavailability

Following the regulatory ban of animal-derived protein sources in ruminant diets, the quest for excellence in amino acid nutrition (AminoMax) began. Research for this exciting technology was led by Dr. Jim Drouillard at Kansas State University, with an aspiration to produce cost-competitive, carefully processed plant protein sources that would provide high ruminal bypass and superior amino acid bioavailability. Today, AminoMax is manufactured in the United States, Argentina, England, and South Africa.

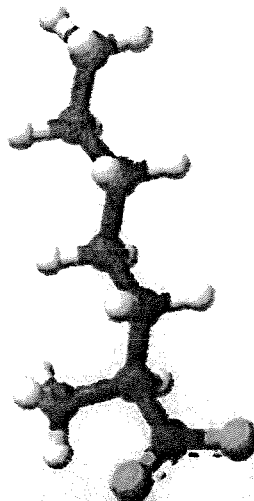
AminoMax represents more than 15 years of exhaustive university research and field testing, supported by an ongoing commitment to progressive improvements in manufacturing technology. The result is cost-effective, safe, plant-based bypass amino acids with far superior bioavailability, unsurpassed in quality and value.

## The AminoMax Difference

Historically, creating by-pass proteins was relatively simple: Combine reducing sugars with protein and heat vigorously to induce **Mallard** reaction. Until recently this is where development stopped. The problem with this process is that it is known to denature protein and destroy lysine and other essential amino acids. Utilizing lower temperatures preserves bioavailability of the lysine.

AminoMax® focuses on optimizing the balance between Rumen Undegradable Protein and the availability of lysine and other essential amino acids.

**The Science of AminoMax®** utilizes the combination of heat and a unique enzyme, coupled with a state-of-the-art manufacturing facility that controls the Maillard reaction, producing a consistently high Rumen Undegradable Protein (RUP) product with a high level of lysine bioavailability. Ultimately, this increased MP (Metabolized Protein) lysine yield per pound of product, which is an unprecedented combination.



Inside Back Panel



## The Future of Amino Acid Nutrition

**AminoMax®** is the most advanced amino acid bypass on the market today! AminoMax provides a consistent level of digestible lysine, methionine and other essential amino acids, which can increase milk protein, milk yield and milk quality.

**Improved Amino Acids provided  
by AminoMax can:**

- **Improve Milk Production**
- **Improve Milk Components**
- **Reduce Manure Nitrogen**



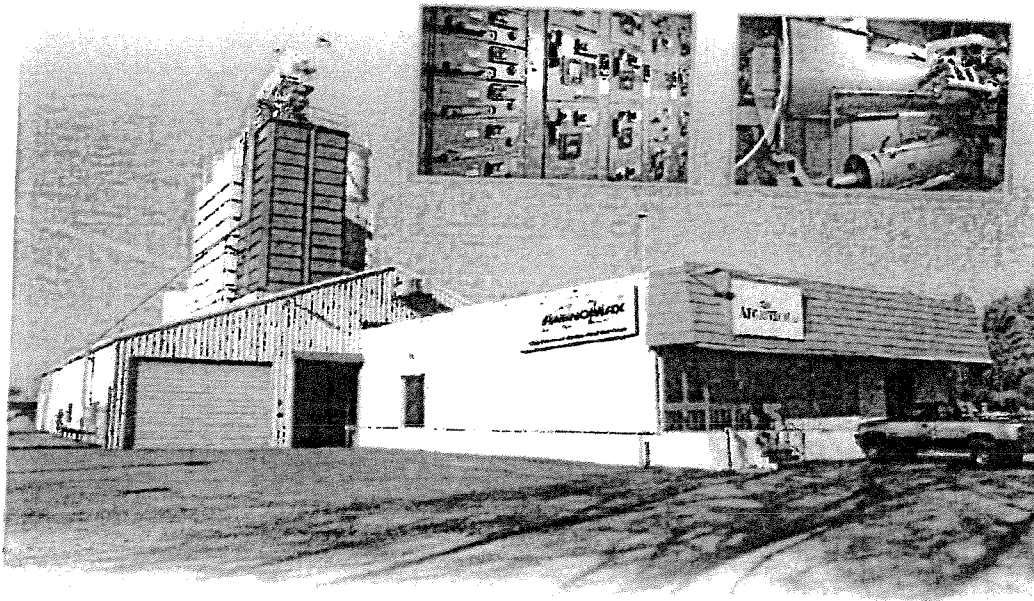
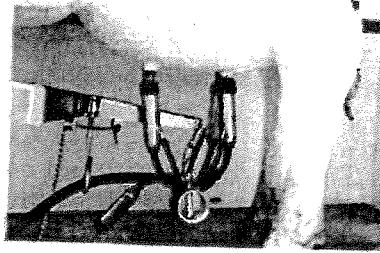
**[www.AminoMax.com](http://www.AminoMax.com)**

Back Flap Panel

# AminoMax

## Amino Acid Bypass Supplement for Dairy Cattle

**AminoMax®** is designed to consistently meet your cows' amino acid requirements and allow your nutritionist or formulator to reduce the amount of crude protein in the diet, maximizing forages and fermentable carbohydrates. University research has shown that when dairy rations are properly formulated with AminoMax®, herd economics can be improved and farm odors can be reduced due to lower levels of nitrogen in the manure, making your dairy farm more environmentally friendly.



Manufactured by **Afgritech, LLC**  
200 Willow St • Watertown, NY 13601-2355  
Phone: 855-785-3625 or 315-785-3625 • Fax: 315-785-3627

[www.AminoMax.com](http://www.AminoMax.com)

Center Back Panel

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

EVONIK DEGUSSA GMBH,  
Opposer,

v.

Opposition No. 91199752

AFGRITECH, LTD.,  
Applicant.

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**APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S  
MOTION FOR SUMMARY JUDGMENT**

# EXHIBIT L

(FILED UNDER SEAL IN ACCORDANCE  
WITH THE PROTECTIVE ORDER)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

EVONIK DEGUSSA GMBH,  
Opposer,

v.

Opposition No. 91199752

AFGRITECH, LTD.,  
Applicant.

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**APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S  
MOTION FOR SUMMARY JUDGMENT**

**EXHIBIT M**

**(FILED UNDER SEAL IN ACCORDANCE  
WITH THE PROTECTIVE ORDER)**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

EVONIK DEGUSSA GMBH,  
Opposer,

v.

Opposition No. 91199752

AFGRITECH, LTD.,  
Applicant.

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**APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S  
MOTION FOR SUMMARY JUDGMENT**

**EXHIBIT N**

**(FILED UNDER SEAL IN ACCORDANCE  
WITH THE PROTECTIVE ORDER)**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

EVONIK DEGUSSA GMBH,  
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v.

Opposition No. 91199752

AFGRITECH, LTD.,  
Applicant.

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**APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S  
MOTION FOR SUMMARY JUDGMENT**

**EXHIBIT O**

**(FILED UNDER SEAL IN ACCORDANCE  
WITH THE PROTECTIVE ORDER)**